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No. 265471
Consolidated with 265480
IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

KITTITAS COUNTY and CENTRAL WASHINGTON HOME
BUILDERS ASSOCIATION, et al,

Petitioners,
v.
EASTERN WASHINGTON GROWTH MANAGEMENT HEARINGS
BOARD et al,
Respondents.

REPLY BRIEF OF KITTITAS COUNTY

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June 11, 2009

**REPLY BRIEF OF
KITTITAS COUNTY**

 **ORIGINAL**

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I. INTRODUCTION

Appellant Kittitas County ("County"), respondent before the Growth Management Hearings Board for Eastern Washington ("Hearings Board"), submits this Reply Brief in its appeal of the Final Decision and Order of the Hearings Board issued on August 20, 2007 in its cause number 07-1-0004c ("FDO"). Kittitas County's position is that the Hearings Board's determination that the County's three-acre zoning violates the Growth Management Act ("GMA") is neither supported by the record nor the law.

The County's decision was not shown the requisite deference by the Hearings Board. The County's decision was not clear error as there was evidence in the record supporting its use of three-acre zoning and explanation of how that met the goals and requirements of the GMA. There is not substantial evidence to support the Hearings Board's ruling, which despite all protests to the contrary, is a bright-line ruling which is beyond the authority of hearings boards. Futurewise and CTED continue to misconstrue the applicable case law.

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II. ARGUMENT

A. Standard of Deference

Contrary to the assertions of Futurewise and CTED, the Hearings Board failed to accord the proper deference to Kittitas County's decision. Futurewise's brief page 9, CTED's brief page 5, 30. After quoting RCW 36.70A.3201¹, the Washington Supreme Court, in *Quadrant Corporation v. Sate of WA GMHB*, stated that

In the face of this clear legislative directive, we now hold that deference to county planning actions, that are consistent with the goals and requirements of the GMA, supersedes deference granted by the APA and courts to administrative bodies in general. (citations omitted) While we are mindful that this deference ends when it is shown that a county's actions are in fact a "clearly erroneous" application of the GMA, we should give effect to the legislature's explicitly stated intent to grant deference to county planning decisions. Thus a board's ruling that fails to apply this "more deferential standard of review" to a county's action is not entitled to deference from this court. 154 Wn.2d 224, 238, 110 P.3d 1132 (2005).

¹ In amending RCW 36.70A.320(3)...the legislature intends that the boards apply a more deferential standard of review to actions of counties and cities than the preponderance of evidence standard provided for under existing law. In recognition of the broad range of discretion that may be exercised by counties and cities consistent with the requirements of this chapter, the legislature intends for the boards to grant deference to counties and cities in how they plan for growth, consistent with the requirements and goals of this chapter. Local comprehensive plans and development regulations require counties and cities to balance priorities and options for action in full consideration of local circumstances. The legislature finds that while this chapter requires local planning to take place within a framework of state goals and requirements, the ultimate burden and responsibility for planning, harmonizing the planning goals of this chapter, and implementing a county's or city's future rests with that community.

1 This standard of deference was not accorded to Kittitas County's
2 decision. There was evidence in the record supporting the County's
3 decision and explanation of how that decision comported with and
4 harmonized the GMA(AR 1746-1779, and 213-221).

5 **B. Deference to County**

6 Contrary to Futurewise's (brief page 9) and CTED's (brief pages
7 30, 39) assertions, the Hearings Board failed to grant the requisite
8 deference to the County's decision. A Hearings Board "shall find
9 compliance" with the GMA unless it determines that a county action "is
10 clearly erroneous in view of the entire record before the board and in light
11 of the goals and requirements" of the GMA. RCW 36.70A.320(3). What
12 that deference looks like, and what constitutes clear error so as to justify a
13 determination of GMA noncompliance was most recently demonstrated in
14 *City of Arlington v. CPSGMHB*, 164 Wn.2d 768, 193 P.3d 1077 (2008).

15 *City of Arlington* concerned the Snohomish County redesignation
16 of some land from an agricultural designation to a commercial one, and
17 the inclusion of that property inside of an expanded urban growth area
18 (UGA) boundary. 164 Wn.2d at 777. There had been evidence in the
19 record supporting the redesignation to commercial in the form of
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1 testimony from a former property owner (*Id.* at 782) and some analysis
2 produced by a consultant hired by the developer (*Id.* at 785-787). The
3 hearings board reversed the county's decision to redesignate the lands and
4 include them in the UGA. *Id.* at 777. The Court of Appeals and the
5 Supreme Court reversed the hearings board stating that "the Board failed
6 to consider important evidence in the record that supports Snohomish
7 County's finding." *Id.* at 774.

8 The Court's specific treatment of these two pieces of evidence is
9 important to examine because of the arguments advanced by CTED on
10 pages 33, 39-41 and Futurewise on pages 24 and 25 of their respective
11 briefs. As to the testimony of the former owner, the hearings board stated
12 that

13 Anecdotal testimony, particularly from an individual whose
14 direct experience with the area is decades removed from
15 the present and whose declared expertise is in dairy rather
16 than crop farming, does not constitute credible evidence on
17 which to support the County's action. Also, as Petitioners
18 noted, this 'finding' was contradicted by others with
19 present-day experience in crop farming in the Stillaguamish
20 Valley. *Id.* at 783.

21 In response to that, the Court of Appeals and the Supreme Court stated
22 that

1 The Board found that the County's action in redesignating
2 the land was clearly erroneous in view of the entire record
3 before the Board and in light of the goals and requirements
4 of the GMA. We find the Board erred in concluding the
5 County committed clear error in determining the land in
6 question has no long-term commercial significance for
7 agricultural production. There is evidence in the record
8 supporting the County's determination on this point, and
9 the Board wrongly dismissed this evidence. Because this
10 evidence supports the County's finding that the land at
11 Island Crossing has no long-term commercial significance
12 for agricultural production, the Board erred in not deferring
13 to the County's decision to redesignate the land for urban
14 commercial use. *Id.* at 782.

15 In other words, despite the presence of contrary evidence in the record, the
16 mere presence of evidence supporting a county decision as comporting
17 with the GMA rendered that county decision not clearly erroneous and
18 required the hearings board to defer to it.

19 The Courts' treatment of the evidence generated by the developer's
20 consultant, which also supported the redesignation to commercial status
21 under the GMA, was similar. The hearings board relied upon a case called
22 *City of Redmond* which considered the non-controlling nature of owner
23 intent, to dismiss that evidence. *Id.* at 788.

24 All *City of Redmond* holds is that a landowner cannot
control whether land is primarily devoted to agriculture by
taking his or her land out of agricultural production. It does
not say the Board may dismiss evidence supporting the
County's decision if it was obtained at the request of an

1 interested party. The Board erroneously used *City of*
2 *Redmond* as a tool with which to dismiss an important
3 piece of evidence that supported the County's position with
4 regards to whether Island Crossing was agricultural land of
5 long-term commercial significance. To the extent this
6 evidence supports the County's conclusion that the land
was not of long-term commercial significance to
agricultural production, and we find that it does, the Board
would be required under the GMA to defer to the County
and affirm its decision redesignating the land urban
commercial. *Id.* at 788.

7 In other words, the interested nature of the presenter of the evidence
8 cannot be grounds for dismissing the evidence, and, if that evidence
9 supports the notion that the county's decision was GMA-compliant, then
10 that decision is not clearly erroneous and the hearings board is "required
11 under the GMA to defer to the County and affirm its decision."

12 Similarly, in this case there was evidence in the record supporting
13 the County's decision as comporting with the GMA (AR 1746-1779) and
14 a written record of how the County harmonized the goals and
15 requirements of the GMA (AR 213-221). Like the hearings board in *City*
16 *of Arlington*, the Hearings Board in this case "failed to consider" this
17 evidence. Nowhere in the FDO did the Hearing Board consider, analyze,
18 or even mention the existence of that evidence.² This evidence supported

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21 ² The argument was obliquely summarized as part of party positions on pages 11 and 14
of the FDO, but the Hearings Board never analyzed the evidence nor the argument.

1 the County's decision to allow three-acre densities because it would
2 maintain and enhance natural resource-based industries such as agriculture
3 and encourage the conservation of productive agricultural lands as
4 required by RCW 36.70A.020(8). As in the *City of Arlington*, Kittitas
5 County's decision to allow three-acre densities in its rural areas was
6 supported by evidence of GMA compliance in the record, rendering such
7 decision not clearly erroneous and the Hearings Board was actually
8 required under the GMA to defer to it. Like in *Quadrant*, when the
9 Hearings Board does not grant the proper deference to a County decision,
10 its decision is not entitle to any deference by a court. The Hearings Board
11 erred in finding the County committed clear error.

12 The Supreme Court in *City of Arlington* had some further
13 comments on "clear error" that warrant attention. The Court stated that
14

15 Because clear error is such a high standard to meet, it
16 follows that situations may exist where a county could
17 properly designate land either agricultural or urban
18 commercial depending on how the county exercises its
19 discretion in planning for growth, without committing clear
20 error...A county's decision to designate land agricultural or
21 urban commercial, or to expand its urban growth area, is
22 thus an exercise of its discretion that will not be overturned
23 unless found to be clearly erroneous in view of the entire
24 record before the Board and in light of the goals and
25 requirements of the GMA. 164 Wn.2d at 793, 794.

1 In other words, if there is evidence that either way an issue is decided the
2 GMA will be fostered, (presumably each choice fostering a different set of
3 goals and requirements) it is the County's discretion to make that choice,
4 not the Hearings Board. This comports with RCW 36.70A.3201 which
5 states that "the ultimate burden and responsibility for planning,
6 harmonizing the planning goals of this chapter, and implementing a
7 county's or city's future rests with that community." When a Hearings
8 Board, as in *City of Arlington* or this case, determines that one choice is
9 GMA complaint and not another when there is evidence in the record that
10 both would be, the Hearings Board has usurped the discretion that belongs
11 to the County.

12
13 CTED's argument regarding *City of Arlington* is fatally flawed. At
14 page 40 of its brief, CTED argues it was the misuse of the *City of*
15 *Redmond* to justify dismissing relevant evidence that was the court's
16 grounds for reversal, and (at page 41 of CTED's brief) that the case "does
17 not stand for the proposition that the Board must defer to a county if there
18 is any evidence in the record supporting the county's decision." When the
19 Supreme Court discussed the testimony of the prior owner as to the
20 viability of the property for commercial agriculture, there was no mention
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1 of the *City of Redmond* or misuse of its notions around owner intent or
2 interested sources of evidence. 164 Wn.2d at 782. All the Court said was

3 There is evidence in the record supporting the County's
4 determination on this point, and the Board wrongly
5 dismissed this evidence. **Because this evidence supports**
6 **the County's finding that the land at Island Crossing**
7 **has no long-term commercial significance for**
8 **agricultural production, the Board erred in not**
9 **deferring to the County's decision to redesignate the**
10 **land for urban commercial use.** *Id.* (emphasis added).

11 Contrary to CTED's position, the Court in *City of Arlington* held that
12 failure to defer to a county decision supported by evidence in the record is
13 error because, by virtue of there being evidence in the record before the
14 county, that decision was not clear error. *Id.* And after explaining, at 164
15 Wn.2d at 788, that hearings boards cannot use *City of Redmond* to get
16 around this notion, the Court reiterated that concept when it said

17 To the extent this evidence supports the County's
18 conclusion that the land was not of long-term commercial
19 significance to agricultural production, and we find that it
20 does, **the Board would be required under the GMA to**
21 **defer to the County and affirm its decision** redesignating
22 the land urban commercial. *Id.* (emphasis added).

23 Instead, CTED, at page 40 of its brief, states that "the County argues that
24 the Board must defer to the County's decision if it is supported by any

1 evidence in the record. Kittitas County misreads the *City of Arlington*.” It
2 is apparent that it is CTED that misreads this case.

3 At page 42 of its brief, CTED states that “The Board reasonably
4 may disagree with Mr. Eberhart and conclude that his opinion conflicts
5 with the statutory mandates in RCW 36.70A.070(5), without
6 impermissibly ‘dismissing’ evidence as described in *City of Arlington*.”
7 The Washington Supreme Court, in the *City of Arlington*, rejected that
8 very argument. At 164 Wn.2d pg 783, the Court recounted the hearings
9 board’s conclusion about the testimony submitted by the previous property
10 owner-“Anecdotal testimony, particularly from an individual whose direct
11 experience with the area is decades removed from the present and whose
12 declared expertise was in dairy rather than crop farming, does not
13 constitute credible evidence on which to support the County’s action.” In
14 other words, the hearings board disagreed with the witness and the
15 conclusion the county drew from that testimony. In response to the
16 hearings board’s dismissal of this evidence, and consequent determination
17 of GMA noncompliance of the county’s redesignation, the Court stated
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19 We find the Board erred in concluding the County
20 committed clear error in determining the land in question
21 has no long-term commercial significance for agricultural
22 production. There is evidence in the record supporting the

1 County's determination on this point, and the Board
2 wrongly dismissed this evidence. Because this evidence
3 supports the County's finding that the land at Island
4 Crossing has no long-term commercial significance for
agricultural production, the **Board erred in not deferring
to the County's decision** to redesignate the land for urban
commercial use. *Id.* at 782. (emphasis added).

5 Contrary to CTED's position, while a hearings board may disagree with
6 testimony, that disagreement is academic because it is error to not defer to
7 a county decision based upon evidence in the record. Indeed "the Board
8 would be **required** under the GMA to defer to the County and affirm its
9 decision." *Id.* at 788. (emphasis added). This is because "the ultimate
10 burden and responsibility for planning, harmonizing the planning goals of
11 this chapter, and implementing a county's or city's future rests with" a
12 county, not with a hearings board. RCW 36.70A.3201. For a hearings
13 board to determine that one option supported, by evidence in the record
14 and chosen by a county, is clear error and that the county should have
15 chosen a different option, also supported by evidence in the record, is a
16 usurpation of the discretion that belongs to counties. 164 Wn.2d 793,
17 794.

19 Because clear error is such a high standard to meet, it
20 follows that situations may exist where a county could
21 properly designate land either agricultural or urban
22 commercial depending on how the county exercises its

1 discretion in planning for growth, without committing clear
2 error.” *Id.*

3 In this case, the County, based upon evidence in the record at AR 1746-
4 1779, decided to include three-acre densities as part of its rural element
5 and because of the presence of this evidence in the record, the Hearings
6 Board was required under the GMA to defer to that decision. Instead, it
7 found the County noncompliant and thereby violated the GMA and
8 usurped the County’s discretion. By finding the County to have
9 committed clear error, despite the presence of supporting evidence in the
10 record, the Hearings Board erred and its decision is not entitled to
11 deference before this Court.

12 At pages 18, 19, 22, and 26 of Futurewise’s brief, it argues that the
13 evidence relied upon by the County is simply wrong. The point under *City*
14 *of Arlington* is that, if there is evidence in the record to support a decision,
15 it is within the discretion of the County, not the hearings board or
16 Futurewise, to make the decision and essentially determine what is right.
17 164 Wn.2d 793, 794.

18 **C. Ignoring the Existence of Evidence Equals Dismissal.**

19 CTED at pages 41 and 43 of its brief argues that, by ignoring the
20 evidence at AR 1746-1779 and pretending that it does not exist, the
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1 Hearings Board did not actually dismiss that evidence and so the holding
2 in the *City of Arlington* does not apply. This is not a credible argument
3 because, at 164 Wn.2d page 774, the Supreme Court said that the fault
4 committed by the hearings board was that it “failed to consider important
5 evidence in the record.” Whether that failure to consider was
6 accomplished by not taking it seriously and dismissing it (as was done in
7 *City of Arlington* at pages 782 and 788) or ignoring its existence as in this
8 case makes no difference. It still amounts to a failure to consider evidence
9 in the record. The Hearings Board cannot escape its obligation under the
10 GMA to defer to County decisions supported by evidence in the record by
11 ignoring that evidence.

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13 **D. Hearings Board Decision Not Supported By
Substantial Evidence.**

14 Neither CTED nor Futurewise contest the fact that the Hearings
15 Board cited to no evidence in the record nor any other authority to support
16 the FDO. Instead, Futurewise recites general provisions from the GMA
17 that merely outline why these are GMA issues, not what specific decision
18 in Kittitas County should be made to comply with them. (Futurewise brief
19 at 12, 13). Futurewise then seeks to prop up the FDO by pointing to
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1 material in the record that the Hearings Board did not actually cite to and
2 that does not actually advance their position.

3 The article by Mr.'s Reeder, Brown, and McReynolds on "rural
4 sprawl" cited beginning on page 15 of Futurewise's brief is merely "phone
5 interviews with local officials" that freely admits that "this kind of
6 subjective, self-assessment approach has its limitations." AR 798. The
7 document contains no information about Kittitas County, but only
8 discusses Mason County, and never describes allowable densities in
9 Mason County. AR 798-805. Instead of being the paragon of land use
10 that Kittitas County should aspire to (Futurewise brief at 16), Reeder et al
11 state at AR 805 that "In contrast, Mason was suffering from a legal
12 moratorium on rural growth, while in Mason County's seat, the city of
13 Shelton, has been stymied by inadequate infrastructure." This piece,
14 though in the record, cannot be touted as evidence to support the FDO
15 determination that Kittitas County's three-acre rural densities do not
16 comply with the GMA.
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18 On page 16 of its brief, Futurewise points to an article in the record
19 (AR 826-829) by Tom Daniels entitled "What to do about rural sprawl" as
20 "[a]dditional evidence in the record" that further supports the FDO
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1 decision that three-acre densities in the rural areas violate the GMA.
2 Besides the fact that this article contains no information about Kittitas
3 County, or even anything about Washington at all, it contains language
4 implying that all densities between 2 and 10 acres constitute sprawl. AR
5 827. This would not support the notion that allowing densities greater
6 than one dwelling unit per five acres (as the issue in this case is put)
7 constitutes sprawl under the GMA because the author appears to contend
8 that 5, and even 10 acre densities, constitute sprawl. In contrast, at AR
9 828, the author lauds Oregon for creating rural residential zones that put
10 250,000 acres of the Willamette valley into zoning that "carr[ies] 3- to 5-
11 acre minimum lot sizes" and asserts that this has kept sprawl from
12 developing. In other words, the article applauds putting vast tracts of land
13 in 3-acre density as a means of preventing sprawl. This document cannot,
14 as Futurewise seeks at pages 16 and 17 of its brief, be considered evidence
15 upon which the Hearings Board could base a determination that Kittitas
16 County's three-acre rural densities violate the GMA.
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18 At page 14 of Futurewise's brief it argues that the County's
19 resource land size requirements somehow indicate that rural designation
20 should be larger to support farming, oblivious of the requirement under
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1 RCW 36.70A.030(16) and 36.70A.070(5) that rural designations are by
2 definition not like resource lands. Futurewise's use of farm size statistics
3 on page 14 is nonsensical. One could just as well argue from their math
4 that the average Kittitas County farm is 248 acres or 5.68 acres, and that
5 both are larger than the five-acre minimums they advocate here.

6 The Hearings Board is to make "its decision on the record
7 developed by the...county...and supplemented with additional evidence if
8 the board determines that such additional evidence would be necessary."
9 RCW 36.70A.290(4). The Hearings Board cited to nothing in support of
10 its FDO and the material in the record identified by Futurewise as
11 potential evidence does not support the Hearings Board's decision. "A
12 board's order must be supported by substantial evidence, meaning there is
13 a sufficient quantity of evidence to persuade a fair-minded person of the
14 truth or correctness of the order." *City of Redmond v. Cent. Puget Sound*
15 *Growth Mgmt. Hearings Bd.*, 136 Wn.2d 38, 46, 959 P.2d 1091 (1998).
16 When, as here, none exists, the hearings board erred.

17
18 Local variation is contemplated in the GMA. RCW
19 36.70A.070(5)(a). County decisions are presumed valid. RCW
20 36.70A.320(1). To overturn a local decision based upon generalized
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1 national information as described by Futurewise at page 15 and 16 of its
2 brief (even if that information actually denigrates the county's position,
3 which it does not in this case), is to turn the presumption on its head and
4 require a county to prove the validity of its local variation without there
5 being anything specific to that county introduced that calls that local
6 variation into question. It essentially presumes local variation invalid until
7 proven otherwise, which is contrary to RCW 36.70A.320(1).

8 **E. Hearings Board Issued a Bright-Line Ruling.**

9 Despite the protests of Futurewise and CTED to the contrary
10 (Futurewise brief at 9, 23, CTED brief at 10, 17) the Hearings Board FDO
11 issued a bright-line ruling.³ Issue number one asked whether the County's
12 "failure to eliminate densities greater than one dwelling unit per five acres
13 in the rural area" violated the GMA. FDO page 6. Futurewise argued
14 that "Kittitas County's Comprehensive Plan fails to eliminate densities
15 greater than one dwelling unit per five acres in the rural area...thereby
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18 ³ Note that on page 10 of Futurewise brief it states "The Eastern Washington Growth
19 Management Hearings Board has Never Applied Bright-line Rules in Reviewing Rural
20 Densities" (and CTED tries to argue the same thing at page 10 of its brief), but in the
21 FDO itself at pages 7 and 54, both Futurewise and CTED argue that the Eastern Board,
22 along with the other two have done just that. It is also interesting to note that at page 11
23 of Futurewise's brief it tries to cite to *Woodmannsee* for the proposition that the Eastern
24 Board has approved greater densities than one unit per five acres in rural areas, but the
FDO at page 16 limited *Woodmannsee* to its facts and disfavored it.

1 designating rural land for urban growth.” FDO page 6, 7. At page 7 of
2 the FDO the Hearings Board stated that “The Petitioners point out all three
3 Growth Management Hearings Boards have held the minimum density is
4 one (1) (DU) per five (5) acres of land; and as this Board explained, ‘this
5 is not to say there is a bright line rule concerning rural lot size.’” At page
6 16 of the FDO, the Hearings Board stated that “This Board and the other
7 two Hearings Boards have studied rural lot sizes, effects of those lot sizes
8 and measured these findings against the requirements of the GMA and its
9 definitions” and then, without citation or reference to anything, declares
10 Kittitas County’s three-acre densities GMA non-compliant. At page 17 of
11 the FDO, the Hearings Board stated “From the record before the Board
12 and review of previous Board decision here in Eastern Washington and
13 Western Washington, the Board must find that densities permitted by
14 Agriculture-3 and Rural-3 regulations are urban and prohibited in the
15 County’s rural element.” At page 54 of the FDO, the Hearings Board
16 points out that CTED argued that “There is no bright line established by
17 the GMA, but with one narrow exception, this Board consistently has
18 found that a pattern of lots smaller than 5 acres in size is urban, rather than
19 rural.” This sort of “lip service” in the FDO to not issuing a bright-line
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1 ruling on rural densities is essentially like saying “it is not an alligator, but
2 merely an eight-foot lizard.” Despite Futurewise’s and CTED’s efforts to
3 demonstrate to the contrary, this ruling is a bright-line determination that
4 the courts have consistently held to be beyond the jurisdiction of a
5 hearings boards. *Viking Properties v. Holm*, 155 Wn.2d 112, 125-129, 118
6 P.3d 322 (2005).

7 In *Thurston County v. Western Washington Growth Management*
8 *Hearings Board*, at footnote 20, the Washington Supreme Court stated that
9 “Although the Board did not explicitly adopt a five acre bright-line rule,
10 such a rule was implicit in its decision because of the way the issue
11 regarding rural densities was framed. The Board framed the issue as to
12 whether the County’s comprehensive plan failed to comply with the GMA
13 by allowing ‘development at densities of greater than one unit per five
14 acres when this board has determined that such densities fail to comply
15 with the GMA.’” 164 Wn.2d 329, 358, 190 P.3d 38 (2008). This is
16 precisely what occurred in this case. As pointed out in the preceding
17 paragraph, from the framing of the issue; to the constant reference to
18 uniform decisions by this and all the other hearings boards; to the lack of
19 citation to the record (hence leaving the only authority being the line of
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1 disfavored bright-line decisions); this ruling is a bright-line determination,
2 despite its language trying to persuade us otherwise.

3 Simply speaking, if one makes a decision based upon (1) all your
4 prior rulings on the issue and (2) the record before you, but fail to cite to
5 that record, which in fact contains no specific evidence to support your
6 decision, you have actually made your decision based only upon all your
7 prior rulings, which is a bright-line determination. Please remember that
8 not only does this FDO contain no citation to the administrative record,
9 the Hearings Board did not even cite to the parties' briefing when it
10 summarized their respective positions. In the absence of such support, the
11 FDO could only be a bright-line ruling based upon its and the other two
12 boards' previous determinations on appropriate rural densities.

13
14 **F. Regulation Can Be In Development Regulation**

15 Futurewise and CTED (in their respective briefs pages 28 and 11-
16 13) Take issue with the County not having regulation within its
17 comprehensive plan. The comprehensive plan is a general policy
18 statement (RCW 36.70A.030(4)) and more specific regulation may be
19 located in a county's development regulations. In the recent *Thurston*
20 *County* case, for example, the comprehensive plan did not specifically
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1 describe various innovative zoning techniques, but the county had left that
2 level of specificity to its development regulations. 164 Wn.2d at 339.
3 Similarly, Thurston County's zoning densities and the regulations
4 pertaining thereto were found in the Thurston County code, not the
5 comprehensive plan. *Id.* at 355, 356. As the Supreme Court stated in
6 *Thurston County*, "Finally, it should be noted that from the beginning the
7 GMA was 'riddled with political necessary omissions, internal
8 inconsistencies, and vague language.' (citations omitted) The GMA was
9 spawned by controversy, not consensus and, as a result, it is not to be
10 liberally construed." *Id.* at 342. Kittitas County's comprehensive plan
11 provides the general policy statements required under the GMA, which is
12 not to be liberally construed so as to require more. The fact that the
13 County provides more specific regulation, such as about the various
14 density regulations and percentages of the rural lands that can be occupied
15 by them,⁴ in its development regulations, rather than in the comprehensive
16 plan should not violate the GMA under *Thurston County*.
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21 ⁴ Which are less dense and occupy a smaller percent of the rural lands than provided for
22 in *Thurston County*. 164 Wn.2d at 339, 356.
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1 ***G. Tugwell, Woods, and Diehl.***

2 Both Futurewise and CTED misuse *Tugwell, Woods, and Diehl.*
3 (Futurewise at 14, CTED at 15). Contrary to the assertion of Futurewise
4 (brief page 14), *Tugwell* did not find that three-acre farms are too small for
5 farming, but rather that, due to the property being surrounded by lot sizes
6 of three acres or less, "The difficulty of managing the farm has also been
7 increased thereby" thus constituting a change of circumstances justifying a
8 rezone. 90 Wn.App. 1, 9, 11, 951 P.2d 272 (1998).

9 *Woods*, contrary to the assertions of CTED (brief at 15), has not
10 been put forth by Kittitas County as an adjudication on GMA compliance.
11 The point the County seeks to make is that, when the issue is 'does the
12 zoning regulation comport with the comprehensive plan,' and, after
13 describing the local circumstances of rural character and rural sprawl, the
14 Supreme Court finds that the County's three-acre zoning is a "reasonable
15 decision based on the county's specific needs," then, when the question
16 becomes 'does the comprehensive plan take into account local
17 circumstances as the GMA allows,' the result should still be that it is "a
18 reasonable decision based on the county's specific needs." 162 Wn.2d
19 597, 622, 174 P.3d 25 (2007).
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1 At page 14 and 15 of its brief, Futurewise states that *Diehl* stands
2 for the proposition “that residential densities of one housing unit, or more,
3 per 2.5 acres would allow for urban-like development, not consistent with
4 primarily agricultural uses.” What *Diehl* actually says is that “Mason
5 County’s CP and DRs list the standard rural residential lot size as 5 acres,
6 but they can be as small as 2.5 acres, a size the Board believes is urban.
7 The [rural activity center] standard residential lot is .5 acres, but allows
8 lots as small as .125 acres. These densities would allow for urban-like
9 development, not consistent with primarily agricultural uses.” 94
10 Wn.App. 645, 656, 972 P.2d 543 (1999). It appears clear that the Court
11 was saying that lots from .5 down to .125 acres were “urban-like,” not
12 that lots between 2.5 and 5 acres were.

14 **H. Kittitas County Has Standards.**

15 CTED argues, at page 13 of its brief, that the County
16 comprehensive plan lacks standards for rezones and, at page 14, that there
17 is not provision for a variety of rural densities. RCW 36.70A.070(5)(b)
18 and (c)⁵ recite some basic requirements that are essentially met by the

19
20 ⁵ (b) Rural development. The rural element shall permit rural development, forestry, and
21 agriculture in rural areas. The rural element shall provide for a variety of rural densities,
22 uses, essential public facilities, and rural governmental services needed to serve the
23 permitted densities and uses. To achieve a variety of rural densities and uses, counties

1 GPO's at AR 213-221 and described in pages 6-8 of the County's opening
2 brief. As held by the Supreme Court, the GMA is not to be liberally
3 construed. 164 Wn.2d at 342. The County's comprehensive plan has
4 complied with the strict requirements of RCW 36.70A.070 and the GMA
5 should not be liberally construed to require it to do more. Further
6 regulation of rezones and the percentage of lands that can be in the various
7 zoning designations exists in the County's development regulations, as
8 they can be as evidenced by the recent *Thurston County* case. The
9 County's seven-part rezone criteria are found at KCC 17.98.020(7) and the
10 percentages of three and five-acre zoning designations that can exist in the
11

12 may provide for clustering, density transfer, design guidelines, conservation easements,
13 and other innovative techniques that will accommodate appropriate rural densities and
14 uses that are not characterized by urban growth and that are consistent with rural
15 character.

16 (c) Measures governing rural development. The rural element shall include measures
17 that apply to rural development and protect the rural character of the area, as established
18 by the county, by:

19 (i) Containing or otherwise controlling rural development;

20 (ii) Assuring visual compatibility of rural development with the surrounding rural
21 area;

22 (iii) Reducing the inappropriate conversion of undeveloped land into sprawling, low-
23 density development in the rural area;

24 (iv) Protecting critical areas, as provided in RCW 36.70A.060, and surface water and
25 groundwater resources; and


26 (v) Protecting against conflicts with the use of agricultural, forest, and mineral
27 resource lands designated under RCW 36.70A.170.

1 rural lands are limited respectively to three and five percent by KCC
2 17.04.060. It is not clear why, as stated at page 35 of CTED's brief, it
3 never previously noticed how the County harmonized the goals of the
4 GMA. The County certainly has criteria, and those found in the
5 comprehensive plan meet the requirements of the GMA when strictly
6 construed.

7 **III. CONCLUSION**

8 The FDO by the Hearings Board finding Kittitas County's three-
9 acre zoning violates the GMA was an erroneous interpretation or
10 application of the law, is not supported by substantial evidence, and is
11 outside the statutory authority granted such boards by the GMA. As such,
12 the FDO's pronouncements about Kittitas County's three-acre zoning
13 must be reversed and Kittitas County's three-acre zoning declared GMA-
14 compliant.
15

16 Respectfully submitted this 11th day of June,
17 2009.

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21 Deputy Prosecuting Attorney
22 Attorney for Kittitas County